The following memo from the American Law Division of the Library of Congress makes the silliness of their Resolution clear:

LIBRARY OF CONGRESS,
CONGRESSIONAL RESEARCH SERVICE,
Washington, DC, February 4, 1998.

To: House Committee on the Judiciary.
From: American Law Division.
Subject: Draft Joint Resolution Expressing the Sense of Congress that the Award of Attorneys' Fees in the Magaziner Case Not be Paid With Taxpayer Funds.

This memorandum is furnished in response to your request for an analysis of the above draft joint resolution, which was prompted by a recent federal district court decision. In *Association of American Physicians and Surgeons, Inc. v. Clinton*, 1997 U.S. Dist. LEXIS 20604 (D.D.C. Dec. 18, 1997), the plaintiffs sued for an injunction declaring that the President's Task Force on National Health Care Reform did ''not qualify for an exemption from the Federal Advisory Committee Act [FACA, 5 U.S.C. App. 2 §§1–15] as an advisory group composed solely of 'full-time officers or employees' of the government.'' During the litigation, Ira C. Magaziner, Senior Advisor to President Clinton, submitted a sworn declaration that all working group members were federal employees. The court found that this declaration was false, and that ''the most outrageous conduct by the government in this case is what happened when it never corrected or up-dated the Magaziner declaration.'' Eventually, however, the government took action that amounted to what the court called a ''total capitulation.''

The plaintiff then filed an application with the court for an award of attorneys' fees; i.e., it asked the court to order the government to pay its attorneys' fees. A federal court may not order the United States to pay the attorneys' fees of another party, unless a statute authorizes it to do so. FACA contains no such authorization. However, the Equal Access to Justice Act (EAJA) authorizes awards of attorneys fees against the United States in two instances. First, under 28 U.S.C. §2412(b), it authorizes federal courts to order the United States, when it acts in bad faith, to pay the attorneys' fees of the prevailing party. Second, under 28 U.S.C. §2412(d), it provides that, in any civil action (other than tort cases) brought by or against the United States, ''a court shall award to a prevailing party other than the United States fees and other expenses . . . unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.'' Under §2412(d), but not under §2412(b), fees are capped at $125 per hour, and only individuals whose net worth did not exceed $2 million at the time the civil action was filed, and organizations whose net worth did not exceed $7 million and that had not more than 500 employees, may recover fees.

In response to the plaintiff's motion for an award of attorneys' fees, the court found that, prior to August 1994, the United States had acted in bad faith, and therefore was liable for the plaintiff's attorney's fees for that period without regard to the $125 per hour cap. As to the subsequent period, the court found that the plaintiff had prevailed, that it was an organization with a new worth below $7 million and fewer than 500 employees, and that the position of the United States, though taken in good faith, was not substantially justified. It therefore awarded fees for the subsequent period, subject to the cap. The total award, for both periods, came to $285,864.78.

The draft joint resolution expresses ''the sense of the Congress that the award of $285,864.78 in attorneys' fees, costs, and sanctions that Judge Royce C. Lamberth ordered the defendants to pay in Association of American Physicians and Surgeons, Inc., et al. versus Hillary Rodham Clinton, et al., should not be paid with taxpayer funds.'' As a sense of Congress expressed in a joint resolution, this proposal will have no legal effect if it is enacted. If its language were introduced as a bill and enacted as a public law, then its effect, provided it were upheld as constitutional, would be to preclude the United States from complying with the district court's order to pay the plaintiff its attorney's fees. This hypothetical statute, by itself, would not require anyone to pay the attorney's fees, because, as EAJA permits fee awards only against the United States, there would be no legal basis to assess the fees against anyone else.

An argument might be made, however, that this hypothetical statute would violate the Takings Clause of the Fifth Amendment, which provides: ''nor shall private property be taken for public use, without just compensation.'' The hypothetical statute arguably would deprive the plaintiff of its private property, in the form of a fee award that a court had ordered paid to it. However, *Association of American Physicians and Surgeons, Inc. v. Clinton* remains subject to appeal, and, if it were reversed on appeal, the plaintiff would lose its entitlement to a fee award. *See, Poelker v. Doe*, 432 U.S. 519, 521 n.2 (1977). Consequently this property may not be ''vested,'' and, if the hypothetical statute were to take effect prior to its vesting, then, arguably, no unconstitutional taking would occur. In *Hammon v. United States*, 786 F.2d 8, 12 (1st Cir. 1986), the court of appeals wrote: ''No person has a vested interest in any rule of law entitling him to insist that it remain unchanged for his benefit.'' [Citations omitted]. This is true after suit has been filed and continues to be true until a final, unreviewable judgment is obtained. Chief Justice Marshall first announced that principle in *The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110, 2 L. Ed. 49 (1801). The Supreme Court held in that case that a court must apply the law in force at the time of its decision, even if it is hearing the case on appeal from a judgment entered pursuant to prior law.

A caveat, however: the preceding quotation states only the majority view as to when ''property'' status attaches to a cause of action. There is also case law supporting the ''contention that one has a vested property right in a cause of action once it has somehow accrued. [Citations omitted] Those cases are conceptually difficult to reconcile with cases that hold that a plaintiff does not have a vested property right in a claim unless there is a final nonreviewable judgment.'' *Jefferson Disposal Co. v. Parish of Jefferson, LA*, 603 F. Supp. 1125, 1137 n.31 (E.D. La. 1985).

A cause of action accrues once the injury that gives rise to the cause of action has occurred. Therefore, those cases that find accrual sufficient for vesting would ipso facto find a final lower court judgment sufficient for vesting. Other cases do not make clear whether final judgments trigger property status only once they are no longer reviewable. For example, in *O'Brien v. J.I. Kislak Mortgage Corp.*, 934 F. Supp. 1348, 1362 (S.D. Fla. 1996), the district court wrote: ''Reviewing the relevant Eleventh Circuit case law, it appears clear that a mere legal claim affords no enforceable property right until a final judgment has been obtained.'' One might argue that, even if mere accrual is not sufficient to trigger property status, and a final judgment is necessary, a *nonreviewable* judgment may not be necessary. Again, however, the majority view appears to be that a nonreviewable judgment is necessary. Consequently, it appears that the stronger argument would be that a statute that overturned the award of attorneys' fees in *Association of American Physicians and Surgeons, Inc. v. Clinton*, before a final appeal had been decided or the time in which to appeal had run, would be constitutional.

The draft joint resolution, we reiterate, does not purport to overturn the award of attorneys' fees; it would merely express the sense of Congress that the government not pay the fee award, and does not express the sense of Congress that anyone else pay it.

TAXPAYER REPAYMENT ACT OF 1998

HON. ASA HUTCHINSON

OF ARKANSAS

HON. ROY BLUNT

OF MISSOURI

IN THE HOUSE OF REPRESENTATIVES

Wednesday, February 11, 1998

Mr. HUTCHINSON. Mr. Speaker, my colleague, Mr. BLUNT, and I, would like to point out that over a year and a half ago, an historic agreement was reached under which lawsuits brought by forty states against the tobacco industry would be settled, the tobacco industry and regulation thereon would be restructured, and underage smoking would be targeted for reduction and eventual elimination. Today we are introducing legislation that guarantees that the estimated $386.5 billion to be paid by the tobacco industry under this settlement will, indeed, compensate states and individuals for smoking-related health costs and reduce rates of teen smoking, rather then perpetuate the cancerous growth of big government.

The Taxpayer Repayment Act of 1998 mandates that money collected by the federal government from any tobacco settlement be used to fund only those programs specifically authorized in federal legislation implementing provisions of the national settlement. Any revenue collected beyond what is spent on those specifically-authorized programs—programs that include, but are not limited to youth anti-smoking campaigns, Medicaid reimbursement, FDA regulatory reform, public health programs, compensation to growers, and litigant reimbursement—will be used to pay down the national debt and provide tax relief to all Americans.

Mr. Speaker, the American people have been footing the bill for tobacco-related health costs for far too long. It is only fair that we ensure that this settlement will provide a guarantee that they will be reimbursed for their troubles and not burdened with bigger government. The Taxpayer Repayment Act will do this. It will help protect our nation's children from the ravages of smoking, but it will also protect American citizens against the equally insidious cancer of bigger government and heavier taxation. Mr. Speaker, this is a reasonable and equitable bill, and we would urge our colleagues to support it.

HUTCHINSON-BLUNT TAXPAYER REPAYMENT ACT—SUMMARY

The Taxpayer Repayment Act guarantees that if a global tobacco settlement is enacted into law, health care, youth smoking cessation, and other programs authorized by the implementing legislation may be fully funded. At the same time, it ensures that extra revenue is used to reimburse Americans for their expenditures on tobacco-related health care costs and not burden them with bigger government and higher taxes.

SECTION 1—RESTRICTION OF NEW PROGRAMS

Prohibits money received by the federal government from a global tobacco settlement or from any state settlement from being used to create or maintain any new federal programs unless they are specifically authorized by federal legislation implementing the settlement.

Prohibits tobacco settlement money from being used to expand currently-existing programs unless such expansion is specifically authorized in the terms of the federal legislation implementing the settlement.

SECTION 2—USE OF EXCESS REVENUES

Directs revenues in excess of those used for programs specifically authorized in the terms of legislation implementing any portion of a global tobacco settlement toward tax relief (1/3) and debt repayment (2/3).

Creates a ''Tax Cut Offset Trust Fund'' into which the 1/3 slated for tax relief will be placed for use as Congress, by law, directs.

SECTION 3—SPECIFICS OF DEBT REDUCTION

Exchanges marketable government securities for unmarketable securities currently in the Social Security and other Trust Funds, thereby repaying these trust funds and reducing the national debt.

Requires that after all Trust Fund accounts are replenished, excess revenues be used for direct payments on the national debt.

SECTION 4—PROHIBITION ON USE OF EXCESS FUNDS

Prohibits excess revenues from being counted as new budget authority, outlays, receipts, deficit or surplus, for budget estimates.

Requires that when funds are expended from any trust fund into which tobacco settlement money is placed, a corresponding amount of marketable securities in those funds be sold, and the trust fund balance reduced accordingly.

SWEENEY AND BECKER ON THE RIGHTS AND ROLE OF LABOR IN THE GLOBAL ECONOMY

HON. JOHN J. LaFALCE

OF NEW YORK

IN THE HOUSE OF REPRESENTATIVES

Wednesday, February 11, 1998

Mr. LAFALCE. Mr. Speaker, as world attention has focused on the financial crisis in East Asia, we have failed to consider the role of labor in resolving the Asian economic turmoil. The plight of Asian workers—and by extension, U.S. workers has been addressed only secondarily. Government and institutional officials lament the impact of reduced budgets, higher interest rates, and other deflationary actions on nations' workers, but opine that there is no other choice. In the long run, they argue, all workers will be better off by having a sound economy.

Mr. Speaker, this is old-fashioned thinking for a new age of globalization. Globalization means that we are all tied together. Governments, capitalists, financiers, and labor share economic problems and an economic future. We must either resolve our problems together or the problems will not be resolved. As the President of the AFL–CIO, John Sweeney, recently told participants at the World Economic Forum in Davos, Switzerland, ''If labor has no role, democracy has no future.'' Labor must be part of the solution.

If we do not craft a global economy that allows all participants to benefit from growth, that ensures workers a voice in the economic architecture of the global economy, and that gives as much importance to the rights of labor as to the rights of capital, then globalization will not work. We will continue to fight economic crisis after economic crisis. And in the end, it will not be the financial fires that burn us—it will be the social and political flames that engulf us.

There are steps to be taken. First, the United States must speak out forcefully and at every opportunity for the rights of workers. Internationally recognized labor rights are not onerous to observe. They are the core, basic human rights that the United States should promote and defend as the world's leading democracy.

Second, the United States must actively commit to the Conventions of the International Labor Organization (ILO) by ratifying its core Conventions. There are now 181 Conventions. The United States has ratified 12, and only one—Convention 105 on forced labor—is considered a core Convention. Other core Conventions relate to rights of association, the right to organize and bargain collectively, minimum wage, and child labor. The U.S. should make ratification of all the core Conventions a top priority. The White House now has Convention 111 under consideration that would prohibit discrimination in employment based on race, gender, religion, or national origin. The White House should send this Convention to the Senate for ratification as quickly as possible.

Third, the United States should urge the International Monetary Fund to incorporate labor considerations and standards into its discussions and stabilization programs with member countries. A thriving, prosperous community of workers will translate to a thriving prosperous economy. If workers are left to bear the burdens of economic stabilization inequitably, then countries, companies, and investors will not achieve their stabilization objectives. Mr. Speaker, President John J. Sweeney of the AFL–CIO and President George Becker of the United Steelworkers of America made this case with eloquence and have advanced specific proposals. I wish to submit to the RECORD Mr. Sweeney's speech in Davos, Switzerland on January 31, 1998 and Mr. Becker's testimony before the Committee on Banking and Financial Services on February 3, 1998.

COMMENTS BY JOHN J. SWEENEY

It is a privilege and a pleasure to address the World Economic Forum, and to join the distinguished members of this panel.

Does labor have a role in defining the future? In the United States, ask the opponents of the minimum wage. Or the management of United Parcel Service. Or the proponents of fast track trade accords that ignore labor rights and environmental protections.

Let us be very clear. If labor has no role, democracy has no future. Social Justice does not ''compromise the efficiency of the model.'' It is essential to its survival. If this global economy cannot be made to work for working people, it will rap a reaction that may make the Twentieth Century seem tranquil by comparison.

We meet at an historic turning—one that everyone in these meetings must see. The long effort to build the global market has succeeded. Capital and currencies have been de-regulated. Great corporations have built global systems of production, distribution, marketing. Barriers have been dismantled. Technology's miracles are turning our world into one neighborhood.

But the turnoil affliction the Asian economics sounds a dramatic alarm. The question now is not how to create the global market, but how to put sensible boundaries on the market that already exists. How to make the market work for the majority and not simply for the few. In this new effort, labor and other democratic citizen movements will and must play a central role.

Look around the world. Japan mired in recession, Asia in crisis that China still faces. Russia plagued by a kind of primitive, gangster capitalism, Europe stagnant. Africa largely written off by global investors, Latin America adrift.

The US is hailed as the great ''model.'' Our prosperity is unmatched; the dollar is strong; our budget balanced. Unemployment and inflation are down and profits are up. But, most working people in the United States today labor longer and harder simply to hold their own. One in four children is born to poverty. One in five workers goes without health insurance. The blessings of prosperity have been largely captured by the few. Inequality is at level so obscene that New York investment houses this year warned executives not to talk about the size of their bonuses.

And now, the Asian nations are forced to export their deflation to the U.S. Our annual trade deficit will soar towards $300 billion. Over one million U.S. workers are projected to lose their jobs. Wages, only now beginning to recover, will once again be depressed. And this is the ''model'' in the best of times.

The current collapse calls into question not simply Asian practices but the global system itself. As Korean President Kim Dae Jung has said, authoritarian systems in Asian lived a lie. But their crony capitalism was bankrolled by the reckless high rollers of the global casino, including Japanese, European and American banks and investment houses.

The response to the crisis reveals the limit of the current arrangement. Conservatives say let the market solve the problem. But since the Great Depression no sensible leadership would take that gamble. The IMF is called in to stop the hemorrhaging. It bails out the speculators and enforces austerity on the people. Its prescription reinforces the very affliction it seeks to cure.

Treasury Secretary Robert Rubin has wisely warned about the ''moral hazard'' of bailing out profligate speculators and banks.

But too little has been said about the ''immoral hazard'' of forcing working people across the world to pay the price—in layoffs, declining wages and increasing insecurity.

I have just returned from Mexico, which has been presented as a ''successes'' for Asians to follow. There, speculators and bond holders had their losses covered. But some two million workers lost their jobs. The middle class has been crushed. Wages lost over half their value. Environmental poisoning is worse than ever. Political violence is spreading. Crime is spiraling out of control. Few nations can weather this form of success.

This global system broadcasts its stark contrasts—of untold wealth for the few and growing insecurity for the many, of laws that protect property and expose people, of liberated capital and repressed workers. The inequities are indefensible ethically, but they are also unsustainable economically—as U.S. Federal Reserve Chair Alan Greenspan suggests with his warnings about deflation.

I suggest to you that we must usher in a new era of reform. One that seeks not more